93-108

No. _____

JUL 19 1993

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

COLUMBIA RESOURCE COMPANY, L.P., a Washington limited partnership,

Petitioner,

v.

ENVIRONMENTAL QUALITY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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QUESTION PRESENTED

1. Did the Oregon Supreme Court err when, under the dormant Commerce Clause, it sustained a differential fee on out-of-state waste where the fee is related to costs incurred by the state irrespective whether in-state waste is similarly burdened?

2. In an effort to slow the flow of solid waste to its landfills, may a state, consistent with the Commerce Clause, tax out-of-state consumers based upon their consumption of landfill capacity while taxing in-state consumers based upon their income?

PARTIES

The parties to the proceeding in the Oregon Supreme Court, beyond those listed in the caption, are Gilliam County, Oregon, Oregon Waste Systems, Inc., and the Department of Environmental Quality of the State of Oregon.

Petitioner Columbia Resource Company has no parent or subsidiary companies.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE. 2

REASONS FOR GRANTING CERTIORARI. 7

1. A WRIT OF CERTIORARI SHOULD ISSUE TO THE OREGON SUPREME COURT BECAUSE ITS RESPONSE TO A DIFFERENTIAL SURCHARGE ASSESSED ON DOMESTIC VERSUS FOREIGN WASTE CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT REQUIRING EQUAL TREATMENT OF INTERSTATE AND INTRASTATE COMMERCE 7

a. The Oregon Supreme Court misapplied this Court's teaching on discrimination. . . 11

(1) If the Oregon court did not accept the state's equalized burden argument, it surely misapplied the law. 13

(2) Taxing Oregonians on income while taxing foreign residents on consumption impermissibly discriminates against interstate commerce. . . . 16

(a) The surcharge discriminates on its face. 19

(b) The surcharge discriminates in plain effect. 22

2. A WRIT OF CERTIORARI SHOULD ISSUE TO THE OREGON SUPREME COURT BECAUSE ITS RESPONSE TO A DIFFERENTIAL SURCHARGE ASSESSED ON DOMESTIC VERSUS FOREIGN WASTE DIRECTLY CONFLICTS WITH THE RESPONSE PROVIDED BY THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. 26

CONCLUSION. 30

APPENDICES

Appendix A
Opinion of the Supreme Court of the State of Oregon App-1

Appendix B
Decision of the Oregon Court of Appeals. App-30

Appendix C
Statutes App-68

Appendix D
Excerpts from State's brief to Oregon Court of Appeals. App-75

TABLE OF AUTHORITIES

Cases

	Page
AFSCME Local 2623 v. Dept. of Corrections, 315 Or 74, 843 P2d 409 (1992).....	6
American Trucking Assn. v. Scheiner, 483 U.S. 266 1987).....8,16,17,18	
Armco, Inc. v. Hardesty, 467 U.S. 638 (1984).....7,9,20,21	22,23
Bacchus Imports, Ltd. v. Dias, 468 U.S. 268 (1984).....	22
Best & Co. v. Maxwell, 311 U.S. 454 (1940).....	30
Boston Stock Exchange v. State Tax Commn., 429 U.S. 318 (1977).....	9
Chemical Waste Management, Inc. v. Hunt, 504 U.S. ____, 112 S.Ct. 2009 (1992).....7,8,10,11	12,22
Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1980).....	26
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).....	9
Evansville-Vanderburg A.A. Dist. v. Delta Airlines, Inc., 405 U.S. 713 (1972).....	10

Fort Gratiot Landfill v. Mich. Dept. of Nat. Res., 504 U.S. ____, 112 S.Ct. 2019 (1992)..... 8

Gilliam County v. Department of Environmental Quality, 114 Or App 356, 837 P2d 965 (1992), aff'd. 316 Or 99, 849 P2d 500 (1993)..... 1

Government Suppliers Consolidated Serv. v. Bayh, 975 F.2d 1267 (1992) cert. denied, 113 S.Ct. 977 (1992)..... 27,28

Hughes v. Oklahoma, 441 U.S. 335, (1979)..... 10,19

Hunt v. Washington Apple Advertising Comm'n., 432 U.S. 333 (1977)..... 10,12

Maryland v. Louisiana, 451 U.S. 725 (181)..... 12,13

New Energy Co. v. Limbach, 486 U.S. 269 (1988)..... 13

N.W. States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1955)..... 8

Philadelphia v. New Jersey, 437 U.S. 617 (1978).....8,15,16,19 22,26

Tyler Pipe Inds. v. Dept. of Revenue, 483 U.S. 232 (1987)..... 13

Westinghouse Electric Corp. v. Tully, 466 U.S. 388 (1984).....13,14,16

Rules and Statutory Provisions

O.R.S. 183.400..... 2,5,11

O.R.S. 459.015..... 2

O.R.S. 459.015(1)(c)(d)..... 3

O.R.S. 459.294..... 3

O.R.S. 459.294(5)..... 3

O.R.S. 459.297..... 2,3

O.R.S. 459.298..... 2,3,27

O.R.S. 459A.110..... 3

O.R.S. 459A.120..... 3

O.R.S. 459.305..... 5

O.A.R. 340-61-115..... 2,4

O.A.R. 340-61-120..... 2,4

28 U.S.C. §1257(a)..... 1

United States Constitution
Article I, Section 8, Clause 3.... 2

Or. Laws 1989, Ch. 833..... 2

Or. Laws 1991, Ch. 385 § 91..... 3

84 Mich. L. Rev. 1091
(1986)..... 20

Indiana Code § 13-9.5-5-1(b)..... 27

House Bill 3515..... 2,3

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of Oregon, which affirmed the decision of the Oregon Court of Appeals.

OPINIONS BELOW

The Oregon Supreme Court's opinion in Gilliam County v. Department of Environmental Quality, 316 Or 99, 849 P2d 500 (1993), is reproduced at Appendix A. Appeal to that court was taken from the decision of the Oregon Court of Appeals, 114 Or App 356, 837 P2d 965 (1992), which is reproduced at Appendix B.

JURISDICTION

The Oregon Supreme Court entered its judgment on June 9, 1993. This Court has jurisdiction to review by certiorari the decision of the Oregon Supreme Court pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The pertinent text of the following statutes and regulations is reproduced at Appendix C: ORS 183.400, ORS 459.015, ORS 459.297, ORS 459.298, OAR 340-61-115, and OAR 340-61-120.

United States Const. Art. I, Sec. 8, Clause 3 provides:

> Congress shall have the power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

STATEMENT OF THE CASE

In 1989, the Oregon Legislature enacted comprehensive waste reduction legislation. House Bill 3515, Or. Laws 1989, Ch. 833. Among the findings made, the legislature declared "[t]here is a shortage of appropriate sites for landfills in Oregon" and that "[i]t is in the best interests of the people of Oregon to extend the useful life of solid waste disposal sites by* * * requiring solid waste to undergo volume reduction through recycling and reuse

measures before disposal* * *." ORS 459.015(1)(c), (d). To help further these interests, sections 155 and 156 of House Bill 3515 provide for a surcharge on solid waste generated outside the state of Oregon and disposed within the state. Sections 155 and 156 were codified as ORS 459.297 and 459.298.

ORS 459.298 directs Oregon's Environmental Quality Commission (EQC) to establish by rule the surcharge based upon the costs to the state and its political subdivisions of disposing of solid waste generated outside the state. Sections 152 and 153 of House Bill 3515, ORS 459.294 and 459.295[1], direct as well that the EQC establish a fee on in-state waste.[2] ORS 459.294(5), however, limited the fee on

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[1]ORS 459.294 and 459.295 were renumbered in 1991 as 459A.110 and 459A.120, respectively. Or. Laws 1991, Ch. 385, § 91.

[2]In the interest of readability, out-of-state waste will be referred to as "foreign" waste and in-state waste referred to as "domestic."

domestic waste to $.50 per ton.

In December 1990, the EQC complied and amended Oregon Administrative Rules 340-61-115 and 340-61-120[3] to reflect a surcharge of $2.25 per ton on foreign waste.[4]

Despite these separate fee structures, there is no distinction in composition or quality between domestic and foreign waste.

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[3]OAR 340-61-115 and 340-61-120 are currently renumbered as 340-97-110 and 340-97-120, respectively.

[4]The surcharge is comprised of the following identified costs:

$/ton	Basis for cost
$0.58	Statewide activities for reducing environmental risk and improving solid waste management.
$0.66	Reimbursement to the state for tax credits and other public subsidies.
$0.05	Solid waste reduction activities related to the review and certification of waste reduction and recycling plans.
$0.72	Increased environmental liability.
$0.20	Lost disposal capacity.
$0.03	Publicly supported infrastructure.
$0.01	Nuisance impacts from transportation.
$2.25	TOTAL

(extracted from Rec. 938-51.)

ORS 459.305 requires that all waste disposed in Oregon landfills, except for waste generated in the county of disposal, comply with equivalent waste reduction and recycling standards applicable to domestic waste.

With this in mind, petitioner, a company that collects and arranges for the transport and disposal of waste generated in Clark County, Washington, at a landfill in Morrow County, Oregon, instituted a rule challenge in the Oregon Court of Appeals claiming a violation of the Commerce Clause of the United States Constitution.[5] The state defended the surcharge scheme by arguing that any distinction between domestic and foreign waste is only "apparent." (App 75.) The surcharge assessed against foreign generators of waste, maintained the state, serves only to

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[5]Oregon's Administrative Procedures Act authorizes judicial review of administrative rules pursuant to ORS 183.400. (App 68.)

equalize a burden currently borne by Oregonians through a combination of per ton fees and income taxes.

The court of appeals upheld the rules, reasoning that the surcharge is a compensatory fee because it is limited to the costs of disposal. As such, the court of appeals believed the surcharge facially reasonable and, because ORS 183.400 limits the court's constitutional scrutiny to the face of the rule,[6] found petitioner precluded from proving the fee disproportionate to the costs incurred. (App 67.)

Petitioners thereafter petitioned the Oregon Supreme Court for review and, after granting the petition, that court likewise upheld the rules finding that their nexus to the state's costs provided a discernible basis, apart from origin, for treating

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[6] AFSCME Local 2623 v. Dept. of Corrections, 315 Or 74, 79, 843 P2d 409 (1992).

foreign waste differently. (App. 26.)

REASONS FOR GRANTING CERTIORARI

1. **A WRIT OF CERTIORARI SHOULD ISSUE TO THE OREGON SUPREME COURT BECAUSE ITS RESPONSE TO A DIFFERENTIAL SURCHARGE ASSESSED ON DOMESTIC VERSUS FOREIGN WASTE CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT REQUIRING EQUAL TREATMENT OF INTERSTATE AND INTRASTATE COMMERCE.**

Inconsistent with this Court's fundamental decree that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State," Armco, Inc. v. Hardesty, 467 US 638, 642 (1984), the Oregon Supreme Court sanctioned the state's assessment of a $2.25 per ton surcharge on foreign waste despite a corresponding charge on domestic waste statutorily limited to $.50 per ton. This Court, therefore, should accept review and reverse the Oregon Supreme Court's departure from precedent.

This forum is no stranger to the intensifying battle over waste management. *See, e.g.*, Chemical Waste Management, Inc.

v. Hunt, 504 U.S.____, 112 S.Ct. 2009 (1992)[7]; The regulation at issue here, however, is subtly different from those considered in Chemical Waste, Fort Gratiot, and Philadelphia. Here, there is no blatant embargo or naked protectionism; Oregon, instead, imposes a tax in the form of a user fee assessed on foreign consumers of Oregon landfill capacity, ostensibly calculated to equalize a burden currently borne by domestic consumers, all with a consequent impact on interstate commerce.

Despite this Court's concession that its posture on the dormant Commerce Clause has been "a 'quagmire' of judicial response[]," American Trucking Assns. v. Scheiner, 483 U.S. 266, 280 (1987), "some firm peaks of decision* * * remain unquestioned." N.W. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959).

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[7]*See also* Fort Gratiot Landfill v. Mich. Dept. of Nat. Res., 504 U.S. ____, 112 S.Ct. 2019 (1992); Philadelphia v. New Jersey, 437 U.S. 617 (1978).

Accordingly, whether a revenue tax, a compensatory tax, or a compensatory fee, the Commerce Clause prohibits the discriminatory treatment of interstate commerce. Boston Stock Exchange v. State Tax Comm'n., 429 U.S. 318, 329 (1977). A revenue tax will therefore be stricken if it (1) is not applied to an activity with a substantial nexus with the taxing state, (2) is not fairly apportioned, (3) discriminates against interstate commerce, or (4) is not fairly related to the services provided by the state. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). Similarly, a compensatory tax will be invalidated if it is not based upon a substantially equivalent tax event or if it discriminates against interstate commerce. Armco, 467 U.S. at 643-644. Finally, a compensatory fee will not withstand constitutional scrutiny if it (1) is not based upon a fair approximation of use, (2) discriminates against interstate

commerce, or (3) is excessive compared with the governmental benefit conferred. Evansville-Vanderburg A.A. Dist. v. Delta Airlines, Inc., 405 U.S. 713, 716-717 (1972).

Irrespective, therefore, of the name ascribed to a tax, a court must determine whether on its face or in its effect the tax discriminates against interstate commerce. Hughes v. Oklahoma, 441 U.S. 335, 336 (1979). If it does, "it is typically struck down without further inquiry." Chemical Waste, 504 U.S. ____, 112 S.Ct. at 2014. If the court does inquire further, the burden shifts to the state "to justify [the discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." Hunt v. Washington Apple Advertising Comm'n., 432 U.S. 333, 353 (1977). In this case, the question of

discrimination is dispositive because the limited form of judicial review authorized by Oregon's Administrative Procedures Act disables, in large part, the state from factually justifying the discrimination. *See* ORS 183.400. (App 68.) Moreover, assuming the state could justify the discrimination, a uniform charge on both domestic and foreign waste is clearly an adequate nondiscriminatory alternative. *See* Chemical Waste, 504 U.S.____, 112 S.Ct. at 2015.

a. The Oregon Supreme Court misapplied this Court's teaching on discrimination.

The Oregon Supreme Court concluded that the surcharge, because it is statutorily tied to costs, is not facially discriminatory and is "'justified by a valid factor unrelated to economic protectionism.'"[8] (App 26.) The court

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[8]It is unclear whether the court found the surcharge discriminatory. The court stated that because the surcharge is driven by costs, it does

further classified the surcharge as a compensatory fee, but considered itself statutorily constrained from determining whether it is disproportionate. (App 28.)

At the outset, the Oregon court's constitutional analysis is analytically suspect because it paints just half a picture. Equality of treatment is the standard for a valid tax upon interstate commerce. Maryland v. Louisiana, 451 U.S. 725, 759 (1981). That the surcharge is limited to costs, therefore, is constitutionally irrelevant unless a surcharge likewise offsetting costs is assessed on domestic waste.

It is significant, then, in terms of

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not discriminate on its face; however, the court follows with "'justified by a * * * factor unrelated to * * * protectionism,'" (App 26)--language relevant only where discrimination exists. Chemical Waste, 504 U.S.____, 112 S.Ct. at 2015. If the court considered the surcharge nondiscriminatory, its analysis misses the mark. If, instead, the court considered the surcharge discriminatory, its analysis is incomplete. The state must "demonstrably justif[y]" the fee and it must establish the unavailability of nondiscriminatory alternatives. Hunt, 432 U.S. at 353.

analysis, that the court was unclear about the state's claim that domestic generators pay, through the $.50 per ton charge on domestic waste and general income taxes, an amount equal to the $2.25 per ton paid by foreign generators.

(1) If the Oregon court did not accept the state's equalized burden argument, it surely misapplied the law.

This Court has routinely invalidated legislation denying to foreign taxpayers the favorable treatment accorded their domestic counterparts. *See, e.g.*, New Energy Co. v. Limbach, 486 U.S. 269 (1988) (Tax credit granted exclusively to Ohio ethanol producers.)[9]

In Westinghouse Electric Corp. v. Tully, 466 U.S. 388 (1984), Justice Blackmun

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[9]*See also*, Tyler Pipe Inds. v. Dept. of Revenue, 483 U.S. 232 (1987)(Washington multiple activities exemption enjoyed by domestic manufacturer/wholesalers denied to foreign manufacturers wholesaling domestically and domestic manufacturers wholesaling elsewhere); Maryland, 451 U.S. 725 (1981) (Exemptions and tax credits for "first use" tax on natural gas conferred on Louisiana consumers withheld from interstate consumers).

considered whether a New York tax credit lowering the effective tax rate on gross receipts from a domestic international sales corporation's New York based operations violated the Commerce Clause. In response to the state's claim that taxes collected from interstate commerce were properly apportioned, this Court responded:

> The acceptability of the allocation formula employed by the state of New York is not relevant to the question before us. The fact that New York is attempting to tax only a fairly apportioned percentage of a DISC's accumulated income does not insulate from constitutional challenge the state's method of allowing the DISC export credit.* * * "Fairly apportioned" and "nondiscriminatory" are not synonymous terms.

466 U.S. at 399.

Analogously, here, "compensatory" and "nondiscriminatory" are not synonymous terms. The question whether the surcharge on foreign waste compensates the state of Oregon for its costs was not the one properly answered by the Oregon Supreme Court; rather, the court should have

answered the question whether the state's method of recovering the "costs" of disposal only from foreign generators of waste impermissibly discriminates against interstate commerce.[10]

A user fee which seeks full compensation only from foreign consumers of landfill capacity impermissibly shifts the burden of financing the state's solid waste program to interstate commerce. The surcharge on foreign waste, therefore, is the same form of parochial economic protectionism repeatedly stricken by this Court. *See*, Philadelphia, 437 U.S. at 626-627.

If, on the other hand, the Oregon court impliedly accepted the state's equalized burden argument, the state's method of tax

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[10]While it might intuitively appear that the components of the surcharge, if indeed "costs," must somewhere be extracted from Oregon taxpayers, components such as, among others, nuisance impact and increased environmental liability are abstractions; the state, therefore, suffers no per ton expense of manpower or equipment. These "costs" are currently unfunded by Oregonians.

collection remains constitutionally infirm.

(2) Taxing Oregonians on income while taxing foreign residents on consumption impermissibly discriminates against interstate commerce.

The Oregon Supreme Court failed to recognize that discrimination may manifest itself in the means as well as the ends of legislation. Philadelphia, 437 U.S. at 626. Method, therefore, matters. Westinghouse, 466 U.S. at 398.

The state claimed that the distinction drawn between domestic and foreign waste, by assessing the former $.50 and the latter $2.25 per ton, is only "apparent." (App 75.) According to the state, domestic generators theoretically shoulder their share of the state's costs with a hybrid tax--$.50 on each ton of landfill consumption and the remaining $1.75 through general income taxes. Foreign generators, conversely, shoulder their share of the burden exclusively through fees on landfill consumption. American Trucking captures

the point:

> The precise issue is therefore more subtle: Do the methods by which the * * * taxes are assessed discriminate against some participants in interstate commerce in a way that contradicts the central purpose of the Commerce Clause?* * *
>
> The way in which a tax levied on participants in interstate commerce is measured and assessed bears directly on whether it implicates central Commerce Clause values.

483 U.S. at 282.

The "precise issue" in American Trucking was Pennsylvania's scheme for financing the maintenance of its highway system. Foreign truckers were required to pay a marker fee, whereas a domestic trucker's marker fee was "deemed" part of its registration fee. Also, all truckers, both foreign and domestic, were required to pay an axle tax; however, Pennsylvania's registration fee, exacted only from domestic carriers, was reduced in an amount equal to the axle tax. Justice Stevens observed that the practical result was an assessment of

marker fees and axle taxes exclusively on interstate carriers. Id. at 281-282.

Like Oregon, Pennsylvania premised its defense of the scheme upon the fact that, prior to the challenged taxes, Pennsylvania carriers paid a higher relative tax rate and that the new taxes were merely an attempt to equalize the burden. Id. at 287. This Court, however, declined to explore Pennsylvania's tax structure:

> "[i]mplementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing State on other taxpayers engaging in different transactions would plunge the court into the morass of weighing comparative tax burdens." J. Hellerstein, 1 State Taxation: Corporate Income and Franchise Taxes, par. 4.125[5], pg. 150 (1983). The flat taxes must stand or fall on their own.

Id. at 289.

Similarly, it was error for the Oregon court to accept, if indeed it did so, the state's argument that "taxes of at least the same magnitude" as the surcharge on foreign

waste are imposed on domestic generators through income taxes. Just as similarly, the surcharge must stand or fall on its own. Properly isolated, then, the surcharge must fall because it discriminates on its face and in plain effect. *See* Philadelphia, 437 U.S. at 626.

(a) The surcharge discriminates on its face.

A facially discriminatory measure is subject to this Court's strictest scrutiny and may, itself, be a fatal defect. Hughes, 441 U.S. at 337 (1979). Apparently noting that the term "facial discrimination" is nowhere precisely defined under the Commerce Clause, the state suggests that its distinction between domestic and foreign waste, given Oregonians' supplemental contributions to the solid waste program via income taxes, is only "apparent" and therefore not "facially" discriminatory. (App 75-76.) The Oregon court concluded that the surcharge is not facially

discriminatory in light of its "express nexus" to costs incurred. (App 26.) Neither view, however, reflects the law.

This Court's precedents uniformly hold that legislation requiring different treatment of interstate and intrastate commerce constitutes facial discrimination. *E.g.* Armco, Inc., 467 U.S. at 642. The question is whether a formal distinction is sufficient to activate the label or whether the measure must evince substantive protectionism before it is coined "facially" discriminatory.[11]

Armco provides the answer. West Virginia's supreme court upheld that state's gross receipts tax because domestic manufacturers, although exempt from the gross receipts tax, paid a higher

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[11]Professor Regan, in his frequently cited article The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, explains that a per se rule against explicitness prevails. 84 Mich. L. Rev. 1091, 1148 (1986). In other words, distinctions by state line denominate a law as facially discriminatory. It is not necessary that there be a substantive disadvantage.

manufacturing tax thereby offsetting an apparent burden on nonresidents. Id. at 641. This Court rejected the West Virginia court's compensating tax rationale, concluding that, "on its face," the gross receipts tax discriminated against interstate commerce by treating differently two companies selling tangible property at wholesale in West Virginia "depending on whether the taxpayer conducts manufacturing in the state or out of it." Id. at 642.

Correspondingly, despite the state's claim here that the burden borne by foreign generators of waste is offset through income taxes, the surcharge scheme treats two consumers of landfill capacity differently depending on whether the consumer generates waste in the state or out of it. The surcharge scheme is therefore discriminatory on its face and, because of the obvious nondiscriminatory alternative, fails the elevated scrutiny which necessarily follows.

(b) The surcharge discriminates in plain effect.

Economic protectionism is unconstitutional per se. Philadelphia, 437 U.S. at 624. Economic protectionism may inhere in discriminatory purpose or discriminatory effect. Chemical Waste, 540 U.S.____, 112 S.Ct. at 2015, n.6. Moreover, discrimination against foreign taxpayers is as constitutionally significant as discrimination against foreign goods. Bacchus Imports, Ltd. v. Dias, 468 U.S. 268, n. 8 (1984).

This Court's opinion in Armco further illustrates how a differential tax on interstate interests, ostensibly equalized elsewhere in the state's scheme of taxation, may impermissibly discriminate against nonresident taxpayers. West Virginia's bifurcated tax structure, a gross receipts tax on nonresident manufacturers offset by a manufacturing tax on resident manufacturers, was invalidated because it exposed

nonresident manufacturers, unlike their domestic competitors, to the possibility of multiple taxation. Should Ohio similarly choose to enact a manufacturing tax, reasoned Justice Powell, an Ohio manufacturer would pay Ohio's manufacturing tax and West Virginia's gross receipts tax; whereas, a West Virginia manufacturer would suffer only the manufacturing tax. 467 U.S. at 644. The tax structure fell as a measure "unfairly apportion[ing] income from other states." Id.

Oregon's scheme of financing its solid waste program likewise exposes foreign consumers of landfill capacity, unlike their domestic competitors, to multiple tax liability. Although the state's justification for the surcharge scheme may seem superficially defensible, it does not consider foreign consumers of Oregon landfill capacity who earn their income in Oregon. These persons will finance the

state's solid waste program twice.

For example, a Washington corporation sited in Clark County, Washington, pays Oregon income tax on the business it conducts in Oregon. This nonresident will also pay $2.25 a ton to dispose of its waste, which, by way of Clark County's flow control ordinance,[12] is destined for Morrow County, Oregon. The nonresident, therefore, will pay both the $2.25 surcharge and the theoretical $1.75 per ton in Oregon income tax[13]--a total of $4.00. However, a domestic concern that disposes of its waste at the same landfill in Morrow County will pay just $.50 per ton and the theoretical $1.75 in income tax--a total of $2.25.[14]

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[12]Clark County Ordinance, Ch. 9.32.

[13]$1.75 represents the difference purportedly paid through income taxes between the $2.25 fee on foreign waste and the $.50 fee on domestic waste.

[14]Similarly, a citizen of Washington residing in Clark County who works across the border in Portland, Oregon, will pay more than his "fair share" of the state's solid waste program through Oregon state income taxes deducted by his employer and through the $2.25 surcharge on foreign waste.

Moreover, the surcharge affects generators differently depending upon state boundaries. A nonresident's tax is measured exclusively by her consumption of Oregon landfill capacity; an Oregonian's tax, conversely, is only nominally linked to consumption. While a nonresident consumer will incur $2.25 of tax liability with each additional ton of space consumed, an Oregonian incurs just $.50[15]--a significantly disparate disincentive to the consumption of landfill capacity. Because an Oregonian's tax liability primarily fluctuates with her income and not her

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[15]Apparently concerned that invalidation by the courts of the $2.25 per ton fee would create a situation in which only domestic waste was subject to an additional levy, the Oregon Legislature in 1991 amended the statute to subject foreign waste to the same $.85 per ton charge as domestic waste. See Or. Rev. Stat. § 459A.110(6) (1991) (as amended by 1991 Or. Laws Ch. 385, § 13). (This fee was added to the $2.25 fee, which was left in place by the Legislature.) If the $2.25 per ton fee ultimately is upheld by the courts, however, the $.85 per ton fee would again be limited to domestic waste. 1991 Or. Laws Ch. 385, §§ 91 and 92. Thus, the ultimate result would be the same as under the original 1989 law--the charge for domestic waste would be $.85 per ton, while the surcharge for out-of-state waste would be $2.25 per ton.

consumption, a nonresident is far more likely to mitigate her waste production and consequent consumption of the state's disposal space.

The state may effect its avowed purpose of reducing waste production by penalizing the flow of all waste to Oregon landfills; however, by imposing a scheme that is not similarly transaction sensitive, the state exports a disproportionate burden of conserving Oregon's landfill capacity. *See* Philadelphia, 437 U.S. at 629.[16]

2. **A WRIT OF CERTIORARI SHOULD ISSUE TO THE OREGON SUPREME COURT BECAUSE ITS RESPONSE TO A DIFFERENTIAL SURCHARGE ASSESSED ON DOMESTIC VERSUS FOREIGN WASTE DIRECTLY CONFLICTS WITH THE RESPONSE PROVIDED BY THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

Contrary to the Oregon Supreme Court, the United States Court of Appeals for the

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[16] *Accord*, Commonwealth Edison Co. v. Montana, 453 U.S. 609, 619 (1980) (Montana's severance tax upheld because "the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers").

Seventh Circuit recognized these weaknesses in Government Suppliers Consolidated Serv. v. Bayh, 975 F.2d 1267 (1992), *cert. denied*, 61 U.S.L.W. 3478 (1993), giving rise to a conflict warranting this Court's resolution.

In 1991, Indiana enacted a virtually identical fee on foreign waste. Ind. Code section 13-9.5-5-1(b) provides:

> The solid waste management board shall adopt rules to establish and impose a fee on the disposal or incineration of solid waste:
>
> (1) Generated outside Indiana;
>
> (2) In a final disposal facility in Indiana; necessary to offset the costs incurred by the state or a county, municipality, or township that can be attributed to the importation of the solid waste into Indiana and the presence of the solid waste in Indiana.

(emphasis supplied). Almost verbatim, ORS 459.298 provides in pertinent part:

> [T]he amount of the surcharge shall be based on the costs to the state of Oregon and its political subdivisions of disposing of solid waste generated out of state* * *.

(emphasis supplied).

Indiana's position in defense of the

consequent scheme distinquishing domestic from foreign waste is succinctly stated in the seventh circuit's opinion:

> According to Indiana, the "statute simply authorizes the solid waste management board to adopt rules imposing fees on trash generated outside Indiana in an amount 'necessary to offset' governmental costs attributed to the importation of such waste." Indiana argues that "at present, the state and local governments, and thus Indiana taxpayers, bear the cost of regulating solid waste disposal and long term cleanups in Indiana." It argues that "once this additional burden to the state is identified* * *, the state is 'constitutionally permitted to level the playing field.'"

975 F.2d at 1283. (citations omitted).

Oregon's justification is eerily familiar:

> All garbage dumped in Oregon--in state and out--imposes costs on the state of Oregon. Those costs are borne by Oregon taxpayers. Oregon is entitled to charge reasonable fees gauged to relieve its taxpayers of the burdens imposed by petitioner's choice to dump garbage in Oregon.* * *.
>
> Petitioner's complaint of discrimination arises because the costs garbage generated in Oregon imposes on the state are paid by a combination of per ton fees and general funds revenues, while the cost of out-of-state garbage is paid by per ton fees

alone.* * *.

> It is constitutionally irrelevant that Oregon defrays a part of the costs of in-state garbage by general fund revenues collected from all Oregon taxpayers rather than by per ton charges collected from all Oregon waste producers because doing so is not protectionism.

(App 77-80.) (footnotes omitted).

The same statutory directive, contemplating the same administrative response, was, once challenged, justified by the same argument: It is constitutionally acceptable for foreign generators to pay through tipping fees what domestic generators already pay through general revenue taxes. The seventh circuit's response, however, was markedly different than Oregon's Supreme Court:

> In short, while Indiana wishes to use general public revenues to support Indiana users of landfills, it intends to impose a user fee on interstate users.
>
> The problem with Indiana's argument is that it would allow a state to tax interstate commerce more heavily than instate commerce any time the entities involved in interstate

> commerce happened to use facilities supported by general tax funds. We find no support in the case law for such a result.

975 F.2d at 1284. (footnotes omitted).

The Oregon Supreme Court, conversely, sanctioned the bifurcated tax scheme on the ground that, insofar as the surcharge on foreign waste is limited to costs, it is a constitutionally acceptable form of compensation. (App 27.)

Another state, inclined to enact a solid waste program financed from per ton fees on interstate waste and general revenue measures on intrastate waste, will find it impossible to reconcile these results or anticipate another court's response.

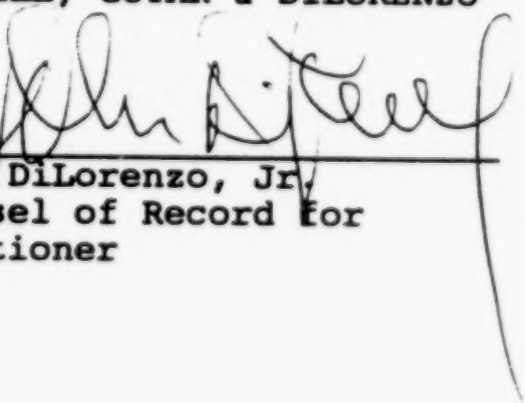
CONCLUSION

This Tribunal's aggressive defense of interstate commerce has forced states to become more imaginative in allowing their citizens a misunderstood priority over domestic landfill capacity. The Commerce Clause, however, forbids discrimination,

"whether forthright or ingenious." Best & Co. v. Maxwell, 311 U.S. 454, 455 (1940). As Oregon and Indiana demonstrate, a cost based surcharge on foreign waste ostensibly equalizing a tax burden already borne by domestic generators represents an emerging trend. This Court, therefore, should accept review to correct the error of the Oregon Supreme Court, to reconcile the intolerable conflict between the Oregon Supreme Court and the United States Court of Appeals for the Seventh Circuit, and to settle this immediate question of constitutional law.

Respectfully submitted,

O'CONNELL, GOYAK & DILORENZO

By 

John DiLorenzo, Jr.
Counsel of Record for
Petitioner

JULY 14, 1993

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OREGON

GILLIAM COUNTY, OREGON, and
OREGON WASTE SYSTEMS, INC.,

Petitioners on Review,

v.

DEPARTMENT OF ENVIRONMENTAL
QUALITY OF THE STATE OF OREGON,

Respondent on Review,

COLUMBIA RESOURCE COMPANY, L.P., a
Washington Limited Partnership,

Petitioner on Review,

v.

ENVIRONMENTAL QUALITY COMMISSION,

Respondent on Review.

(DEQ 45-1990; CA A68441 (Control), A68455)
(cases consolidated)
(SC S39659, S39658)

On review from the Court of Appeals*

Argued and Submitted March 4, 1993

*Judicial review from the Department of Environmental Quality and the Environmental Quality Commission. 114 Or App 369, 837 P2d 965 (1992).

COUNSEL

John DiLorenzo, Jr., of O'Connell, Goyak & DiLorenzo, Portland, argued the cause and filed the petition for petitioner on review Columbia Resource Company, L.P. With him on the petition was Michael E. Farnell.

J. Laurence Cable, of Cable, Huston, Benedict, Haagensen & Ferris, Portland, argued the cause for petitioner on review Oregon Waste Systems, Inc. James E. Benedict filed the petition for review. With Mr. Benedict on the petition was James M. Coleman, of O'Donnell, Ramis, Crew & Corrigan, Portland, who waived argument for petitioner on review Gilliam County, Oregon.

Robert M. Atkinson, Assistant Attorney General, Salem, argued the cause for respondents on review. With him on the response to the petition were Theodore R. Kulongoski, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

OPINION

GRABER, J.

At issue in this case is the validity of regulations imposing a per-ton surcharge on the disposal in Oregon of solid waste generated outside the state. ORS 459.297(1) provides:

> "Beginning on January 1, 1991, every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site

shall pay a surcharge as established by the Environmental Quality Commission under ORS 459.298. The surcharge shall be in addition to any other fee charged for disposal of solid waste at the site."

ORS 459.298 provides:

"Subject to approval by the Joint Committee on Ways and Means during the legislative sessions or the Emergency Board during the interim between sessions, the Environmental Quality Commission shall establish by rule the amount of the surcharge to be collected under ORS 459.297. The amount of the surcharge shall be based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for under the provisions of [statutes relating to solid waste disposal, domestic solid waste disposal, and household hazardous waste disposal]. These costs may include but need not be limited to costs incurred for:

"(1) Solid waste management;

"(2) Issuing new and renewal permits for solid waste disposal sites;

"(3) Environmental monitoring;

"(4) Ground water monitoring; and

"(5) Site closure and post-closure activities."

As authorized by ORS 459.297 and 459.298, the Environmental Quality Commission (EQC) promulgated rules

pertaining to the disposal of solid waste. OAR 340-61-115(1) provides in part:

> "Beginning July 1, 1984, each person required to have a Solid Waste Disposal Permit shall be subject to a three-part fee consisting of a filing fee, an application processing fee and an annual compliance determination fee as listed in OAR 340-61-120. In addition, each disposal site receiving domestic solid waste shall be subject to an annual recycling program implementation fee as listed in OAR 340-61-120, and a per-ton fee on domestic solid waste * * *. In addition, each disposal site or regional disposal site receiving waste generated out-of-state shall pay a surcharge * * *."

OAR 340-61-120(6) provides:

> "Surcharge on disposal of waste generated out-of-state. Each solid waste disposal site or regional solid waste disposal site that receives solid waste generated out-of-state shall submit to the Department of Environmental Quality a per-ton surcharge of $2.25. This surcharge shall apply to each ton of out-of-state waste received at the disposal site[.]"

Petitioners Oregon Waste Systems, Inc., Columbia Resource Company, L.P., and Gilliam County, Oregon,[1] sought judicial review of

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[1]The Court of Appeals explained petitioners' interest in the surcharge:

OAR 340-61-115(1) and 340-61-120(6) in the Court of Appeals pursuant to ORS 183.400.[2]

"Petitioner Oregon Waste Systems, Inc. (OWS), owns and operates a regional solid waste disposal facility known as the Columbia Ridge Recycling Center and Landfill. It is located southwest of Arlington in Gilliam County. OWS disposes of waste generated in Oregon and also waste generated outside of Oregon. The operation provides direct and indirect benefits to petitioner Gilliam County as a result of employment in the county and the payment of local fees and taxes.

"Petitioner Columbia Resource Company, L.P. (CRC), has a 20-year contract with Clark County, Washington, under which it disposes of solid waste originating there. CRC uses the Finley Buttes Landfill in Morrow County as its disposal site. The operator of the Finley Buttes Landfill passes through to CRC the costs incurred for disposal, including charges made by respondent Department of Environmental Quality (DEQ)."

Gilliam County v. Dept. of Environmental Quality, 114 Or App 369, 372, 837 P2d 965 (1992).

[2]ORS 183.400 provides in part:

"(1) The validity of any rule may be determined upon a petition by any person to the Court of appeals in the manner provided for review of orders in contested cases. The court shall have jurisdiction to review the validity of the rule whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, but not when the petitioner is a party to an order or a contested case in which the validity of the rule may be determined by a court.

"* * * * *

"(3) Judicial review of a rule shall be limited to an examination of:

Petitioners argue that, because ORS 459.298 requires approval of the amount of the surcharge by the Joint Ways and Means Committee or by the Emergency Board and because those approval provisions are not severable from the remainder of the statute, ORS 459.298 violates Article I, section 21;[3] Article III, sections 1[4] and 3;[5]

"(a) The rule under review;

"(b) The statutory provisions authorizing the rule; and

"(c) Copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures.

"(4) The court shall declare the rule invalid only if it finds that the rule:

"(a) Violates constitutional provisions;

"(b) Exceeds the statutory authority of the agency; or

"(c) Was adopted without compliance with applicable rulemaking procedures."

[3]Article I, section 21, of the Oregon Constitution, provides in part:

"[N]or shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution[.]"

Article IV, section 25;[6] and Article V,

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[4]Article III, section 1, of the Oregon Constitution, provides:

> "The powers of the Government shall be divided into three separate (sic) departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

[5]Article III, section 3, of the Oregon Constitution, provides in part:

> "(1) The Legislative Assembly is authorized to establish by law a joint committee composed of members of both houses of the Legislative Assembly, the membership to be as fixed by law, which committee may exercise, during the interim between sessions of the Legislative Assembly, such of the following powers as may be conferred upon it by law[.]"

The enumerated powers include the power, in an emergency, to allocate funds to state agencies, to authorize state agencies to expend funds already allocated but in excess of agency budgets, and to revise or amend the budgets of state agencies; and the power to approve, or revise and approve, budgets for new activities. Id. at § 3(1)(a) to (d).

[6]Article IV, section 25, of the Oregon Constitution, provides:

> "A majority of all the members elected to each House shall be necessary to pass every bill, or Joint resolution; and all bills, and Joint resolutions so passed, shall be signed by the presiding officers of the respective houses."

section 15b,[7] of the Oregon Constitution. As a result, they argue, the implementing regulations also are invalid. In the alternative, petitioners argue that, even if ORS 459.298, OAR 340-61-115(1), and OAR 340-61-120(6) are valid under the Oregon Constitution, they are invalid because they impermissibly discriminate against interstate commerce in violation of the Commerce Clause, Article I, section 8, clause 3,[8] of the Constitution of the United States.

Respondent Department of Environmental Quality (DEQ), the state agency for which

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[7]Article V, section 15b, of the Oregon Constitution, provides in part:

> "(1) Every bill which shall have passed the Legislative Assembly shall, before it becomes a law, be presented to the Governor; if the Governor approve, the Governor shall sign it; but if not, the Governor shall return it with written objections to that house in which it shall have originated[.]"

[8]Article I, section 8, clause 3, of the Constitution of the United States, provides:

> "The Congress shall have Power * * * To regulate Commerce * * * among the several States[.]"

EQC is the policy making body, concedes that, "to the extent [that ORS 459.298] subjects DEQ's surcharge determination to Emergency Board approval," that statute is unconstitutional under Article III, sections 1 and 2,[9] and Article IV, section 25, of the Oregon Constitution. DEQ argues, however, that that portion of the statute is severable and that the remainder of the statute and its accompanying regulations are valid under the Oregon Constitution and under the Commerce Clause, Article I, section 8, clause 3, of the Constitution of the United States.

The Court of Appeals accepted DEQ's concession as to the unconstitutionality of the portion of ORS 459.298 relating to approval of the surcharge by the Emergency

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[9]Article III, section 2, of the Oregon Constitution, provides:

> "The Legislative Assembly shall have power to establish an agency to exercise budgetary control over all executive and administrative * * * agencies of the State Government."

Board, concluding that that portion violates Article III, section 3, of the Oregon Constitution. Gilliam County v Dept. of Environmental Quality, 114 Or App 369, 375-76, 837 P2d 965 (1992). The Court of Appeals concluded that the portion of ORS 459.298 relating to approval of the surcharge by the Joint Committee on Ways and Means also is unconstitutional, because it violates Article IV, section 25, of the Oregon Constitution. Id. at 379-80. The court held, however, that those portions of the statute are severable and that "the language that remains after both approval provisions are deleted is still a workable statute that contains clear standards for EQC to follow." Id. at 378, 382-383. Next, the Court of appeals held that OAR 340-61-115(1) and 340-61-120(6) do not violate the Commerce clause, because the surcharge imposed on out-of-state waste is a permissible "compensatory fee for specific

costs incurred by the state" in the disposal of that waste and because, under the scope of review granted to the court by ORS 183.400, the court could not say that the amount of that fee either impermissibly exceeds those state costs or is insufficiently related to the services provided by the state in relation to disposal of out-of-state waste. Id. at 383-88. We affirm the decision of the Court of Appeals.

We begin by considering petitioners' state law claims. See State v. Kennedy, 295 Or 260, 262, 666 P2d 1316 (1983) (court decides questions of state law before reaching federal constitutional issues). Further, "[t]his court follows the principle that constitutional issues should not be decided when there is an adequate statutory basis for a decision." Planned Parenthood Assn. v. Dept. of Human Resources, 297 Or 562, 564, 687 P2d 785 (1984).

In a challenge to a regulation under ORS 183.400(4), this court first decides whether the regulation was promulgated according to applicable rulemaking procedures. ORS 183.400(4)(c). We then decide whether the promulgation of the regulation was within the jurisdictional authority of the promulgating agency and whether the substance of the regulation neither departed from the legal standard expressed or implied in the enabling statute, nor contravened any other applicable statute. ORS 183.400(4)(b). Only after determining that the regulation meets those requirements do we consider the question whether the regulation violates any provision of the Oregon or United States Constitution. ORS 183.400(4)(a). See Planned Parenthood Assn. v. Dept. of Human Resources, supra, 297 Or at 565 (setting forth that three-part analysis).

First, petitioners make no contention

that the challenged regulations were "adopted without compliance with applicable rulemaking procedures," namely, the rulemaking procedures established by ORS 459.298. ORS 183.400(4)(c).

Next, as petitioners concede, EQC had jurisdictional authority to promulgate OAR 340-61-115(1) and 340-61-120(6). Petitioners do not contend that those regulations depart from the legal standards expressed or implied in the authorizing statute. ORS 459.298.

Petitioners contend, however, that, because the regulations include the cost of out-of-state waste reduction certification as a component of the surcharge, they contravene ORS 459.305. We disagree. ORS 459.305(1) provides that disposal sites may not accept waste generated outside the county in which the site is located unless DEQ certifies that the latter area has implemented a recycling program. ORS

459.305(4) permits DEQ to establish, according to the rulemaking procedures provided in ORS 468.065, a certification fee in relation to that requirement. Nothing in ORS 459.305 or 468.065 prohibits DEQ from including the cost to the state of certifying out-of-state waste reduction programs as a component of the surcharge authorized under ORS 459.298.

For the above reasons, we conclude that OAR 340-61-115(1) and 340-61-120(6) are not invalid under ORS 183.400(4)(b) in any of the particulars urged by petitioners.

We thus reach the question whether OAR 340-61-115(1) and 340-61-120(6) violate any provisions of the Oregon or United States Constitutions, ORS 183.400(4)(a), and turn to petitioners' state constitutional claim. We begin by asking whether, as petitioners allege, the statute in accordance with which those regulations were promulgated is itself impermissible in relation to any provision

of the Oregon Constitution. See ORS 183.400(3)(b) (judicial review of rule includes examination of statutory provisions authorizing the rule).

As did the Court of Appeals, we conclude that ORS 459.298 is unconstitutional in two respects. First, as respondent concedes, ORS 459.298 is constitutionally impermissible insofar as it requires approval of EQC's rules by the Emergency Board. Second, the statute is constitutionally impermissible insofar as it requires approval of EQC's rules by the Joint Committee on Ways and Means. As written, ORS 459.298 requires either the Emergency Board (in the interim between legislative sessions) or the Joint Committee on Ways and Means (during sessions of the Legislative Assembly) to approve the rules before they can become legally effective. That requirement gives the Emergency Board or the Joint Committee on Ways and Means the

right to veto the rules. But, a veto is a legislative act, and a legislative act by less than a majority vote of each chamber is unconstitutional. See Or Const. Art III, § 3, set out in part at note 5, supra (authorizing establishment of Emergency Board with certain enumerated powers, not including the power to approve or disapprove the rules at issue in this case); Or Const, Art IV, § 25, set out in part at note 6, supra (legislation must be passed by a majority of all members of each house of the Legislative Assembly and signed by the presiding officers of the respective houses); Or Const, Art V, § 15b, set out in part at note 7, supra (legislative enactments must be presented to Governor and either signed by her or returned to legislature with written objections). See also INS v. Chadha, 462 US 919, 103 S Ct 2764, 77 L Ed 2d 317 (1983) (a provision of the Immigration and Nationality Act that

authorized either house of Congress, by resolution, to veto a decision of the Executive Branch to allow a deportable alien to remain in the United States was unconstitutional; citing Article I, sections 1 and 7, of the Constitution of the United States, the Court held that the challenged provision violated the principle of separation of powers and allowed a legislative veto by less than a vote of each chamber).

Nevertheless, the statute as a whole need not be invalidated if the portions that have been found constitutionally impermissible are severable from the remainder. The severability of unconstitutional portions of a statute is governed by ORS 174.040, which provides:

> "It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:

> "(1) The statute provides otherwise;
>
> "(2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or
>
> "(3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent."

Nothing in the text of ORS 459.298 provides that, if any part of that statute were held to be unconstitutional, the remaining parts should not remain in force. See ORS 174.040(1), supra.

Neither are the portions of ORS 459.298 relating to the establishment of the surcharge by EQC and to the bases of that surcharge "so essentially and inseparably connected with and dependent upon" the approval portions of the statute that it is apparent, either from the text or from the legislative history of the statute, that the

former parts would not have been enacted without the latter. See ORS 174.040(2), supra. ORS 459.298 is part of a comprehensive statutory scheme of regulating solid waste, which includes many sections authorizing public bodies to impose fees to recover their costs.[10] The overriding

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[10]Those include: ORS 459.053(9) (DEQ -- fees to repay department costs and fund operation and maintenance of a department-owned landfill disposal site); ORS 459.125(1)(d) (Marion County) -- fees to control and regulate disposal, transfer, and resource recovery sites located in the county); former ORS 459.170(1)(g) (renumbered 459A.025 in 1991) (EQC -- fees to carry out various provisions of the chapter); former ORS 459.200 (7)(b) (renumbered 459A.085 in 1991) (cities and counties -- fees from persons holding collection service franchises); ORS 459.235 (fee for permit to operate a disposal site); ORS 459.236 (permit fees imposed on all disposal sites to pay for removal or remediation of hazardous substances); ORS 459.284 (permit fees that are imposed on governmental unit that has a disposal site to be used for rehabilitation and enhancement of the area around the site); former ORS 459.294 (renumbered 459A.110 and amended by Or Laws 1991, ch 385, § 91) and former ORS 459.295 (renumbered 459A.120 in 1991) (EQC --schedule of fees for receipt of domestic solid waste; to be used to reduce environmental risks at waste disposal sites); ORS 459.305(4) (fee for certification that a governmental unit has implemented recycling opportunity provisions); ORS 459.310 (local governments can impose surcharge on solid waste received at regional disposal sites); ORS 459.311 (local governments must charge for remedial action or removal at solid waste disposal site); ORS 459.335 (user fees set by metropolitan service district); and ORS 459.509 to 459.765 (fees for sale of new tires and disposal of waste tires).

purpose of ORS 459.298, as revealed by its text and context, is to permit the establishment and collection of fees.

We also note, as did the Court of Appeals, the pertinent legislative history. The committee that considered HB 3515, which became Oregon Laws 1989, chapter 833, and which included the challenged provision, was told that "the Emergency Board does not have the approval authority[,] * * * it is a review and comment only." The committee instructed its staff to use "the toughest language we can have for E-Board control over the fee," but the legislature did not add a nonseverability provision. Tape Recording, Ways and Means Committee Subcommittee on Transportation and Regulation, June 24, 1989, Tape 155, Side B.

The legislature's permissible choice was between having no surcharge on the disposal of solid waste generated out of state and having a surcharge established by

EQC without a veto by the Emergency Board or Joint Committee on Ways and Means. As between the two, we believe that the legislature intended to have a surcharge.

Finally, ORS 459.298 is neither incomplete, nor incapable of being executed, in the absence of the approval portions of the statute. See ORS 174.040(3), supra.

The portions of ORS 459.298 relating to approval of the surcharge by the Emergency Board or the Joint Committee on Ways and Means, being unconstitutional and severable, are deleted from the statute. The remaining portions of the statute shall continue in force.

Petitioners have made no other challenges under the Oregon Constitution to OAR 340-61-115(1) and 340-61-120(6), beyond those already discussed. We turn, therefore, to petitioners' claim that ORS 459.298, OAR 340-61-115(1), and OAR 340-61-120(6) impermissibly discriminate against

interstate commerce in violation of Article I, section 8, clause 3, of the Constitution of the United States. For the following reasons, we conclude that they do not.

The Commerce Clause grants to Congress the power to regulate commercial transactions among the states, subject to the specific guarantees of the Constitution of the United States. By that grant of power to Congress, the Commerce Clause implicitly "limits the power of the States to discriminate against interstate commerce." Wyoming v. Oklahoma, ____US_____, 112 S Ct 789, 800, 118 L Ed 2d 1 (1992); see also New Energy Co. of Indiana v. Limbach, 486 US 269, 273, 108 S Ct 1803, 100 L Ed 2d 302 (1988) (stating that principle). As the Supreme Court of the United States has explained, "[t]his 'negative' aspect of the Commerce Clause prohibits economic protectionism -- that is, regulatory measures designed to benefit in-

state economic interests by burdening out-of-state competitors." New Energy Co. of Indiana v. Limbach, supra, 486 US at 273-74.

Consistent with that proscription, states may not enact laws that discriminate against articles of commerce[11] coming from outside the state unless there is some reason, apart from their origin, for treating those articles differently. City of Philadelphia v. New Jersey, 437 US 617, 626-27, 98 S Ct 2531, 57 L Ed 2d 475 (1978). Cf. Chemical Waste Management v. Hunt, ____US ____, 112 S Ct 2009, 2013-15, 119 L Ed 2d 121 (1992) (where the only discernible basis for an additional fee imposed on out-of-state waste was the origin of the waste, "invalidity under the Commerce Clause

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[11]"Solid waste, even if it has no value, is an article of commerce" for Commerce Clause purposes. Fort Gratiot Landfill v. Mich. Dept. of Nat. Res., ____US ____, 112 S Ct 2019, 2023, 119 L Ed 2d 139 (1992); see also Chemical Waste Management v. Hunt, ____US ____, 112 S Ct 2009, 2012 n 3, 119 L Ed 2d 121 (1992) (same); City of Philadelphia v. New Jersey, 437 US 617, 622-23, 98 S Ct 2531, 57 L Ed 2d 475 (1978) (same).

necessarily follows"). The burden is on the state to show that a differential charge "'is demonstrably justified by a valid factor unrelated to economic protectionism.'" Id. at 2015 (quoting Wyoming v. Oklahoma, supra, 112 S Ct at 801), See Fort Gratiot Landfill v. Mich. Dept. of Nat. Res., ____US____, 112 S Ct 2019, 119 L Ed 2d 139 (1992) (holding invalid on Commerce Clause grounds a Michigan statute prohibiting landfills from accepting solid waste generated outside the county in which the landfill was located, unless the acceptance of such waste was explicitly authorized by the receiving county; after rejecting the state's argument that the restriction was justified on the ground that it treated waste from other Michigan counties no differently than waste from other states, and its argument that the statute constituted a "comprehensive health and safety regulation rather than 'economic

protectionism,'" the Court concluded that the state failed to advance "any legitimate reason for allowing [landfills] to accept waste from inside the county but not waste from outside the county").

We apply those principles to the statutes and regulations at issue here. ORS 459.297 requires EQC to promulgate regulations establishing a surcharge on the disposal of out-of-state solid waste. ORS 459.298 requires EQC to base the amount of that surcharge on the "costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for" under other waste disposal programs, including costs arising from permit issuance, management, monitoring, and closure activities at disposal sites accepting out-of-state waste. On their face, OAR 340-61-115(1) and 340-61-120(6) purport to comply with those statutory

mandates.

Because of the express nexus to actual costs incurred, we conclude that the surcharge authorized by ORS 459.297 and 459.298, and established by OAR 340-61-115(1) and 340-61-120(6), does not, on its face, constitute discrimination against an article of commerce, the origin of which is outside the state. There is a discernible basis for the surcharge apart from that origin. See City of Philadelphia v. New Jersey, supra, 437 US at 627-27 (establishing that test). Through the statutory and regulatory criteria, the state has met its burden of showing that the surcharge "is demonstrably justified by a valid factor unrelated to economic protectionism." Chemical Waste Management v. Hunt, supra, 112 S Ct at 2015.

We further conclude that, rather than being a constitutionally impermissible burden on out-of-state economic interests,

New Jersey Co. of Indiana v. Limbach, supra, the surcharge imposed on out-of-state waste by ORS 459.298 and its implementing regulations constitutes a "compensatory" fee for specific costs incurred by the state in the regulation of that waste. See Commonwealth Edison v. Montana, 453 US 609, 621-22, 622 n 12, 101 S Ct 2946, 69 L Ed 2d 884 (1981) (describing such fees). A law imposing a compensatory fee for costs incurred by a state in supervising and regulating the activities of an entity engaged in interstate commerce is prima facie reasonable. Great Northern Ry. Co. v. Washington, 300 US 154, 160, 57 S Ct 397, 81 L Ed 573 (1937). Such a law violates the Commerce Clause only where the amount of the fee is "manifestly disproportionate to the services rendered." Clark v. Paul Gray, Inc., 306 US 583, 599, 59 S Ct 744, 83 L Ed 1001 (1939). See Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines,

Inc., 405 US 707, 92 SS Ct 1349, 31 L Ed 2d 620 (1972) (fees reflecting a fair approximation of the use of facilities and not excessive in relation to costs incurred do not violate the Commerce Clause); Ingles v. Morf, 300 US 290, 294, 57 S Ct 439, 81 L Ed 653 (1936) (a fee burdening interstate commerce may be justified by showing that it constitutes "reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce").

Petitioners contend that, even assuming that some fee could be imposed without offending the Commerce Clause, the present fees do offend the Commerce Clause, because they are "disproportionate." Such a claim cannot be adjudicated in the present proceeding. Our scope of review under ORS 183.400 precludes us from deciding whether the surcharge is impermissible as "disproportionate" to the services rendered or to the costs incurred by the State of

Oregon in connection with permitting waste disposal sites to accept solid waste generated out of state, because those are factual inquiries. As this court noted in AFSCME Local 2623 v. Dept. of Corrections, 315 Or 74, 79, 843 P2d 409 (1992), "judicial review under ORS 183.400 is limited to the face of the rule and the law pertinent to it. Numerous individual fact situations can arise under any rule, but judicial review of the rule as applied to each of those situations is reserved to other forums." Similarly, petitioners' claim of disproportionality may not be addressed in this proceeding under ORS 183.400.

The decision of the Court of Appeals is affirmed.

APPENDIX B

IN THE COURT OF APPEALS OF THE

STATE OF OREGON

GILLIAM COUNTY

and Oregon Waste Systems, Inc.,

Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent.

(CA A68441 (Control))

COLUMBIA RESOURCE COMPANY L.P.,

Petitioner,

v.

ENVIRONMENTAL QUALITY

COMMISSION,

Respondent.

(CA A68455)

(Cases Consolidated)

Judicial Review of Administrative Rules.

Argued and submitted September 6, 1991.

J. Laurence Cable, Portland, argued the cause for petitioners Gilliam County, Oregon, and Oregon Waste Systems, Inc., With him on the brief were James E. Benedict, Donald A. Haagensen, Hill, Huston, Cable, Ferris & Haagensen, Timothy V. Ramis, Jeff Bachrach, and O'Donnell, Ramis, Crew & Corrigan, Portland.

John A. DiLorenzo, Jr., Portland, argued the cause for petitioner Columbia Resource Company, L.P. With him on the brief was O'Connell, Goyak & DiLorenzo, Portland.

Robert M. Atkinson, Assistant Attorney General, Salem, argued the cause for respondents. With him on the brief were David Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Before Buttler, Presiding Judge, and

Rossman and De Muniz, Judges.

De MUNIZ, J.

Rules held valid.

De MUNIZ, J.

Petitioner Oregon Waste Systems, Inc. (OWS), owns and operates a regional solid waste disposal facility known as the Columbia Ridge Recycling Center and landfill. It is located southwest of Arlington in Gilliam County. OWS disposes of waste generated in Oregon and also waste generated outside of Oregon. The operation provides direct and indirect benefits to petitioner Gilliam County as a result of employment in the county and the payment of local fees and taxes.

Petitioner Columbia Resource Company, L.P. (CRC), has a 20-year contract with Clark County, Washington, under which it disposes of solid waste originated there. CRC uses the Finley Buttes Landfill in

Morrow County as its disposal site. The operator of the Finley Buttes Landfill passes through to CRC the costs incurred for disposal, including charges made by respondent Department of Environmental Quality (DEQ).

Petitioners challenge the constitutionality of two DEQ rules that the Environmental Quality Commission (EQC) adopted in December, 1990, OAR 340-61-115(1); OAR 340-61-120(6), and the enabling statutes that established the legal standards and procedures for adoption of those rules. ORS 459.297; ORS 459.298. The portions of the rules that petitioners challenge impose a surcharge for in-state disposal of garbage generated out-of-state.[1]

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[1]Pertinent parts of the rules provide:

"Beginning July 1, 1984, each person required to have a Solid Waste Disposal Permit shall be subject to a three-part fee consisting of a filing fee, an application processing fee and an annual compliance determination fee as listed in OAR 340-61-120. In addition, each disposal site receiving domestic solid waste shall be subject to an annual recycling program implementation fee as

In 1989, the legislature enacted Oregon Laws 1989, chapter 833, an amalgamation of several bills dealing with waste reduction. Section 155, codified as ORS 459.297, provides that every person who disposes of solid waste that was generated out-of-state must pay a surcharge to help meet the cost to the state of administering the solid waste program.[2] Section 156, codified as

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listed in OAR 340-61-120, and a per-ton fee on domestic solid waste as specified in section (5) of this rule. In addition, each disposal site or regional disposal site receiving solid waste generated out-of-state shall pay a surcharge as specified in section (6) of this rule." OAR 340-61-115(1).

"Each solid waste disposal site or regional solid waste disposal site that receives solid waste generated out-of-state shall submit to the Department of Environmental Quality a per-ton surcharge of $2.25. This surcharge shall apply to each ton of out-of-state solid waste received at the disposal site." OAR 340-61-120(6).

[2]ORS 459.297 provides:

"(1) Beginning on January 1, 1991, every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site shall pay a surcharge as established by the Environmental Quality Commission under ORS 459.298. The surcharge shall be in addition to any other fee charged for disposal of solid waste at the site.

"(2) The surcharge collected under this section shall be deposited in the State

ORS 459.298, enables EQC to establish the amount of the surcharge.[3] The rules impose on the disposal site a surcharge of $2.25 per ton for out-of-state waste that the site receives. The surcharge imposed at the disposal site for waste generated within

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Treasury to the credit of an account of the Department of Environmental Quality. Such moneys are continuously appropriated to the department to meet the costs of the department in administering the solid waste program under ORS 459.005 to 459.426, 459.705 to 459.790 and 459A.,005 to 459A.665."

[3]ORS 459.298 provides:

"Subject to approval by the Joint Committee on Ways and Means during the interim between sessions, the Environmental Quality Commission shall establish by rule the amount of the surcharge to be collected under ORS 459.297. The amount of the surcharge shall be based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for under the provisions of ORS 459.235 and ORS 459.297, 459.298, 459.411 to 459.417, 459A.100 to 459A.120 to sections 70 to 73 chapter 833, Oregon Laws 1989. These costs may include but need not be limited to costs incurred for:

"(1) Solid waste management;

"(2) Issuing new renewal permits for solid waste disposal sites;

"(3) Environmental monitoring; and

"(4) Site closure and post-closure activities."

Oregon is capped at $.05 per ton. Former ORS 459.294(5).[4]

The Oregon Supreme Court has explained that, before we can reach constitutional issues under ORS 183.400,[5] we must first determine: (1) whether the agency had the general authority to make that kind of rule; (2) whether the agency followed the procedures prescribed by statute or regulation; and (3) whether the substance of the rule departed from the legal standard expressed or implied in the enabling legislation or contravened some other applicable statute. Planned Parenthood

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[4]ORS 459.294 was renumbered ORS 459A.110 in 1991. Or Laws 1991, ch 385, § 91.

[5]ORS 183.400(4) provides:

> "The court shall declare the rule invalid only if it finds that the rule:
>
> "(a) Violates constitutional provisions;
>
> "(b) Exceeds the statutory authority of the agency; or
>
> "(c) Was adopted without compliance with applicable rulemaking procedures."

Assn. v. Dept. of Human Res., 297 Or 562, 565, 687 P2d 785 (1984).

> "These steps are designed to assure that the challenged action, particularly an action challenged for arguably violating constitutional rights, in fact was authorized by the state' or local government's politically accountable policy makers. Only if the action was clearly so authorized is there any reason to decide whether the state or local government has adopted a policy that the constitution forbids." 297 Or at 565.

Petitioners do not contend that the agency did not have the general authority to make rules imposing surcharges on solid waste. They also make no meritorious arguments that the substance of the rules deviated form the legal standard provided in the statute[6] or that they contravened some

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[6]Gilliam County argues that the agency improperly considered various costs to include as components of the surcharge. It cites Kids Against the Cut v. Wage and Hour Comm., 41 Or App 179, 597 P2d 1264 (1979), for the proposition that we must examine DEQ's "methodology to develop" these costs to determine whether the agency "failed to act in conformance with the enabling statute." That infers too much from Kids Against the Cut. In that case, we held only that we may look at the record to see whether the agency made a determination on which its authority to act was predicated, not that we may consider whether the method used to reach that

other applicable statute.[7] Their

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determination was correct.

[7]Petitioners assert in one short paragraph that EQC violated ORS 459.305 by including in the surcharge $.50 per ton for what EQC calls "solid waste reduction activities related to reviewing and certifying out-of-state waste reduction and recycling plans." They argue that certification fees may not be "lumped into the surcharge levied on all out of state waste," because they must be "set in accordance with ORS 486.065," which they believe requires the fee to be set by a rule after a hearing. Moreover, they observe, the fee is "subject to review of the Executive Department and the prior approval of the appropriate legislative review agency." ORS 459.305(4).

Even assuming, without deciding, that ORS 459.305 is the exclusive source of authority for EQC to assess the certification fee, we see nothing in the statute that prohibits the agency from considering that fee at the same time that it considers the surcharge and nothing that requires the fee to be established by a separate rule, rather than as a component part of a more general rule. We also see nothing in ORS 468.065 (since amended by Or Laws 1991, ch 752, § 15) that requires the certification fee to be set by a rule after a hearing. Subsection (1) pertains only to permits issued under various sections of ORS chapters 448, 454 and 468. Subsection (2) pertains only to fees for permits issued pursuant to the specified sections that govern water and air pollution sources. Subsection (3) describes the costs that the agency may consider in determining fees for certification of hydroelectric power projects. Subsections (4) and (6) are the only subsections to which ORS 459.305(4) could refer. The former provides that DEQ may require various documents and reports to be submitted by those who apply for permits; the latter merely addresses what must be done with the fees that the DEQ collects. Neither requires a separate rule or a hearing.

We also see no merit in petitioners' second argument under ORS 459.305(4). As far as we can tell, that subsection requires nothing different from the procedure specified under ORS 459.298. Petitioners do not explain any other way that we

procedural argument is that ORS 459.298 requires the agency to follow a process that violates the Oregon Constitution and that the statute in its entirety is therefore invalid, so no rules could be made under it. They argue in the alternative that, if the procedures are permissible, then the rules are invalid, because the agency did not follow those procedures. If the rules were made by a valid procedure, they argue, they are nonetheless invalid, because they impermissibly discriminate against interstate commerce in violation of the United States Constitution.

We turn first to the state law issues. Planned Parenthood Assn. v. Dept. of Human Res., supra. Under ORS 459.298, the amount of the surcharge is subject to approval by the Joint Committee on Ways and Means (Committee) during legislative sessions or

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should read it, and we decline to try to create an argument for them.

by the Emergency Board during the interim. OWS argues that the grant of authority to the Emergency Board violates the state constitution. CRC agrees and argues that subjecting the rules to approval by the Committee is also unconstitutional. Both petitioners assert that the unconstitutional provisions render the statute unconstitutional and, therefore, that the rules promulgated under it are invalid. If the approval requirements are valid, they argue, then the rules are invalid, because EQC did not seek to obtain final approval from either authority.

Respondents concede, and we agree, that ORS 459.298 is unconstitutional to the extent that it subjects the surcharge determination to Emergency Board approval, because the Board has only the powers granted to it in Article II, section 3, of the Oregon Constitution. Art IV, §§ 1, 25. Those powers do not include the power to

veto EQC's surcharge rule.[8] Respondents argue, however, that the language requiring Emergency Board approval is severable from ORS 459.298, that the statute is workable without that provision and that EQC followed the correct procedure by not obtaining final approval of the Board.

The starting point for deciding that issue is ORS 174.040, which states the legislative preference for severability:

> "It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:
>
> "(1) The statute provides otherwise;
>
> "(2) The remaining parts are so essential and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or

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[8]No one has raised, and we do not decide, any issue about the validity of a statutory requirement that EQC consult the Emergency Board, any legislative committee or legislative counsel.

> "(3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent."

Petitioners contend that Emergency Board approval is essential to the remaining parts, because without it the statute cannot be executed in accordance with legislative intent.

The bills that comprised HB 3515, which became Oregon Laws 1989, chapter 833, had been referred first to subject matter committees to consider their substance and then to the Joint Committee on Ways and Means to consider their fiscal impacts. The Joint Committee on Ways and Means, the first committee to consider HB 3515 as a whole, inserted the Emergency Board approval requirement without providing a detailed explanation for it. Petitioners rely on the history of other sections of the bill that also included Emergency Board oversight. On the basis of that history, they argue that "the overriding philosophy***was to maintain

strict E-Board control over fees of various agencies" and that the legislature would not have enacted the statute without that control.

The history cited by petitioners shows that members of the Committee were informed that, legally, the Emergency Board could review and comment on the surcharges, but that it did not have approval authority. During consideration of the State Fire Marshall's authority to establish a fee schedule relating to hazardous wastes,[9] a legislative committee staff member, Acuff, commented:

> "Mr. Chairman, I believe that legislative counsel will tell you that the Emergency Board does not have the approval authority***that it is a review and comment only."

The response of the chair, Representative Hanlon, was to instruct staff to include control "to the extent authorized by law."

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[9]The quotations are from Tape Recording, Ways and Means Subcommittee on Transportation and Regulation regarding HB 3515, June 24, 1989, 155B.

The history also demonstrates that inclusion of Emergency Board review was intended to permit the exertion of political, even if not legal, pressure:

"Acuff: "Well, I think you're accomplishing your objective***. I think you're accomplishing the objective that you want now in limiting the dollars that you have in your first four decisions. You're forcing the fee structure as it is and they will come back to you and prove that [to] you either to the E-Board or to the Assembly.

"Rep.Jones: Except that ***if [the Fire Marshall does not prove the need to the Emergency Board to increase fees] they go ahead and do it anyway.

"Acuff: I doubt that the Fire Marshall would go ahead and do it anyway.

"Rep.Hanlon: So do I. We will be breaking for a quick lunch at 12:30***half an hour or so. Up to the lounge and get come cornflakes. I would like to see the amendment. I'm not sure

because I wasn't listening to the whole thing, but I think Representative Jones and I agree the amendment should be made to the fullest extent possible to control the imposition of those fees. And that means that E-Board***whoever it is that's approving it in the legislature has the authority***that authority***whatever authority they have, they may, may exercise at that point.

"Sen.Hill: Mr. Chairman.

"Rep.Hanlon: Larry.

"Sen.Hill: I'd agree. I'd ask that the committee request Sue to give us the toughest language we can have for E-Board control over the fee."

We infer from that discussion that the legislature wanted to exercise whatever authority it could over the imposition of fees but that it understood that Emergency Board might not have the power to overrule the agency. Nevertheless, it did not enact a nonseverability provision, as it

presumably would have done had it intended to override the preference for severability contained in ORS 174.040.

With the unconstitutional provision granting approval authority to the Emergency Board omitted, the statute provides:

> "Subject to approval by the Joint Committee on Ways and Means during the legislative sessions, the Environmental Quality Commission shall establish by rule the amount of the surcharge to be collected under ORS 459.297."

The statute, so read, is restrictive in that it limits the approval requirement to when the legislature is in session. That does not render the statute unworkable. We conclude that the unconstitutional provision relating to Emergency Board authority is severable.

Read that way, however, the statute still requires EQC to submit the surcharge rules to the Committee for approval. CRC argues that that provision also violates the Oregon Constitution. It urges us to adopt the reasoning of INS v. Chadha, 462 US 919,

103 S Ct 2764, 77 L Ed 2d 317 (1983), which held unconstitutional a provision of the Immigration and Nationality Act of 1952, 8 USC §§ 1101 et seq, that purportedly authorized a one-house legislative veto of the Attorney General's determination that a particular deportable alien should not be deported. 8 USC § 1254(c)(2). Respondents do not directly respond to those arguments but, in the course of explaining that the Emergency Board provision is severable, they conclude that "without the offending provision the statute simply provides that the agency shall set the rates." We assume, however, that respondents did not intend that to be an affirmative concession that the provision subjecting the rules to the approval of the Committee is also unconstitutional.

CRC argues that, even if approval of

the surcharge is a legislative act,[10] the Committee cannot do it, because all bills must be approved by a majority of each house, Or Const, Art IV, § 25, and presented to the governor for signature. Or Const, Art V, § 15b.[11] The plain language of the statute provides that the rules are subject to approval of the Committee; it does not provide that the rules are subject to approval of the Legislative Assembly. The

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[10]Respondents concede that, if approval of the surcharge rule is an executive act, then only the Executive Branch may approve. Or Const, Art III, § 1. They also do not argue that any part of the legislature could approve the surcharge, if approval is a judicial act.

[11]Article IV, section 25, provides:

> "A majority of all the members elected to each House shall be necessary to pass every bill, or Joint resolution; and all bills, and Joint resolutions so passed, shall be signed by the presiding officers of the respective houses."

Article V, section 15b(1), provides:

> "Every bill which shall have passed the Legislative Assembly shall, before it becomes a law, be presented to the Governor; if the Governor approve, the Governor shall sign it; but if not, the Governor shall return it with written objections to that house in which it shall have originated, which house shall enter the objections at large upon the journal and proceed to reconsider it."

legislature has required approval of the Emergency Board or the "Legislative Assembly" before agency action can take effect in other contexts, but it did not use such language here. See, e.g., ORS 341.565(4); ORS 537.805(4)(a).[12] Although the legislature has the undoubted authority to enact laws establishing charges, nowhere does the legislative history suggest that anyone thought that the provision required any action by the Legislative Assembly beyond review by the Committee. We therefore read the words "Joint Committee on Ways and Means" to signify that the

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[12]We note that several other 1989 enabling statutes that contained language requiring Committee or Emergency Board approval were amended in 1991. Those statutes now contain language similar to that in ORS 448.410(1)(d), which governs the adoption of fees to certify persons qualified to supervise the operation of sewage treatment works:

> "Subject to the prior approval of the Executive Department and a report to the Emergency Board prior to adopting the fee, ***. The fees established***shall be within the budget authorized by the Legislative Assembly as that budget may be modified by the Emergency Board."

See also ORS 448.450(1)(d); ORS 453.408(3); ORS 465.385(2)(b).

legislature intended the approval process to be completed by the Committee without further legislative process.

If the statute were given effect as written, it would constitute a command by the legislature ordering EQC to propose legislation to be enacted by the Committee. Respondents concede that the power to enact or repeal laws is vested solely in the Legislative Assembly and that that power cannot be delegated, even to a group of its own members. See Marr v. Fisher et al., 182 Or 383, 388, 187 P2d 966 (1947); Van Winkle v. Fred Meyer, Inc., 151 Or 455, 49 P2d 1140 (1935); see also 31 Op Att'y Gen 161 (Or 1962-64). The Committee is composed of only 16 legislators, 8 from each house, ORS 171.555, and therefore could not constitute "[a] majority of all the members elected to each House." Or Const, Art IV, § 25. No laws can constitutionally be enacted by the

process described in the statute.[13]

CRC argues that the approval provision is not severable from the statute for all the same reasons that Emergency Board approval is not severable. The starting point again is ORS 174.040. Because the legislature has expressed a strong general preference in favor of severability, we can find the Committee approval requirement not severable only if (1) it is apparent that the legislature would not have enacted the statute without that provision or (2) the resulting parts of the statute would be incomplete and incapable of being executed in accordance with legislative intent.

ORS chapter 459 contains over 40 pages devoted to the control of solid waste. The legislature found that "[t]here is a

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[13]We also note that, even if we were to construe the language to imply that the Committee would submit EQC's proposal to the Legislative Assembly, the statute would still establish a defective process, becau*se all bills must originate in one of the houses and revenue bills must originate in the House of Representatives, Or Const, Art IV, § 18.

shortage of appropriate sites for landfills in Oregon," ORS 459.015(1)(c), and:

> "It is in the best interests of the people of Oregon to extend the useful life of existing solid waste disposal sites by encouraging recycling and reuse of materials whenever recycling is economically feasible, and by requiring solid waste to undergo volume reduction through recycling and reuse measures before disposal in landfills to the maximum extent feasible. Implementation of recycling and reuse measures will not only increase the useful life of solid waste disposal sites, but also decrease the potential public health and safety impacts associated with landfill operation." ORS 459.015(1)(d) (since amended by Or Laws 1991, ch 385, § 7). (Emphasis supplied.)

The legislative scheme was intended to establish a comprehensive system of regulation that provides for broad participation and cooperation among local governments and state agencies, "reserving to the state those functions necessary to assure effective programs, cooperation among local government units and coordination of solid waste management programs throughout the state." ORS 459.015(2)(c) (since

amended by Or Laws 1991, ch 385, § 7). It delegated to EQC and DEQ the authority to adopt and enforce rules in order to implement and assure the effectiveness of the extensive regulatory plan. See ORS 459.025; ORS 459.045; ORS 459.376; ORS 459.385.

Chapter 459 contains a plethora of sections authorizing EQC, DEQ and local governments to impose fees and charges to recover costs at each step in the solid waste control program.[14] As in the

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[14]Those include: ORS 459.053(9) (DEQ--fees to repay department costs and fund operation and maintenance of a department owned landfill disposal site); ORS 459.125(1)(d) (Marion County--fees to control and regulate disposal, transfer and resource recovery sites located in the county); former ORS 459.170(1)(g) (renumbered 459A.025 in 1991) (EQC--fees to carry out various provision of the chapter); former ORS 459.200(7)(b) (renumbered 459A.085 in 1991) (cities and counties--fees from persons holding collection service franchises); ORS 459.235 (fee for permit to operate a disposal site); ORS 459.236 (permit fees imposed on all disposal sites to pay for removal or remediation of hazardous substances); ORS 459.284 (permit fees that are imposed on governmental unit that has a disposal site to be used for rehabilitation and enhancement of the area around the site); former ORS 459.294 (renumbered 459A.110 and amended by Or Laws 1991, ch 385, § 91) and former ORS 459.295 (renumbered 459A.120 in 1991) (EQC--schedule of fees for receipt of domestic solid waste; to be used to reduce environmental risks at waste disposal sites); ORS

statutes at issue here, almost every delegation of authority to charge a fee is accompanied by an explanation of how the fee is to be calculated and how the funds collected are to be used. See, e.g., former ORS 459.170(2) (renumbered 459A.025(2) in 1991); former ORS 459.200(8) (renumbered 459A.085 in 1991); ORS 459.235(2); ORS 459.236(5); ORS 459.284; ORS 459.335. That careful structuring of fees demonstrates that the legislature wanted to ensure that the costs of each protective activity would be borne by those who had created the need for it. It clearly wished to avoid spreading among all Oregonians the costs of mitigating environmental risks that they did not create.

Although the Committee was reluctant to

459.305(4) (fee for certification that a governmental unit has implemented recycling opportunity provisions); ORS 459.310 (local governments must charge for remedial action or removal at solid waste disposal site); ORS 459.335 (user fees set by metropolitan service district); and ORS 459.509-ORS 459.765 (fees for sale of new tires and disposal of waste tires).

delegate final authority to EQC to establish the surcharge, that reluctance was insufficient to motivate it to include in the statute a non-severability clause. See, e.g. INS v. Chadha, supra, 462 US at 932. From that fact, the extensiveness of the regulatory scheme, the detail with which the authority was delegated and the nature of the overall fee structure that the chapter creates, we conclude that the legislature would have enacted ORS 459.297 and ORS 459.298 even if it had known that neither the Committee nor the Emergency Board could have the power to veto the resulting rules.[15] The language that remains after both approval provisions are deleted is still a workable statute that contains clear

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[15]Even without the power to veto administrative rules, the legislature retains oversight by virtue of ORS 171.572, which provides:

> "The Legislative Counsel shall review administrative rules adopted or proposed for adoption by state agencies. Such review shall be in accordance with the provisions of ORS 183.710 to 183.725."

standards for EQC to follow.

After EQC drafted the rule that established the fee, it submitted it to the Emergency Board. The Board instructed EQC that the fee had been set too high for reasons that we need not examine. EQC then redrafted the rule to require a slightly lower fee. It did not, however, submit the amended rule to the Emergency Board or to the Committee for final approval. Strictly speaking, EQC did not follow the procedure prescribed in the statute. The rule is not invalid on that ground, however, because the portion of the statutory procedure that the agency failed to follow is unconstitutional. It would be perverse, indeed, to hold a rule invalid on the ground that the agency did not follow a constitutionally impermissible procedure. No one has otherwise challenged the validity of the procedure that EQC actually employed.

Petitioners contend that OAR 340-61-

115(1) and OAR 340-61-120(6) violate the Commerce Clause, Article I, section 8, clause 3, of the United States Constitution[16] by imposing a higher surcharge for garbage received from out-of-state haulers than that received from in-state haulers.[17]

The Commerce Clause grants Congress the power to regulate commerce among the states. Unless Congress precludes it, states may

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[16]Article I, section 8, clause 3, of the United States Constitution provides:

> "The Congress shall have Power***
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> "******
>
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[17]The rules require Oregon landfill operators to remit the surcharge to DEQ, but do not require them to exact the surcharge from out-of-state haulers. Accordingly, a landfill operator can pass the surcharge on to in-state as well as out-of-state haulers in the form or uniformly increased dumping fees. Nevertheless, because it is interstate commerce that gives rise to the obligation to pay the surcharge, the rules are subject to scrutiny under the Commerce Clause. See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Nat'l Res., _____ US _____, 112 S Ct 2019. _____ L Ed 2d _____ (1992); Evansville Airport v. Delta Airlines, 405 US 707, 714, 92 S Ct 1349, 31 Led 2d 620, (1972); Pickard v. Pullman Southern Car Co., 117 US 34, 6 S Ct 635 29 L Ed 785 (1886).

make laws that affect persons engaged in interstate commerce. However, states cannot enact laws that discriminate against articles of interstate commerce "unless there is some reason, apart from their origin, to treat them differently." City of Philadelphia v. New Jersey, 437 US 617, 627, 98 S Ct 2531, 57 L Ed 2d 475 (1978); See also Chemical Waste Management, Inc. v. Hunt, _____ US _____, 112 S Ct 2009, _____ L Ed 2d _____ (1992); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. Nat'l Res., supra, n 17; New Energy Co. of Indiana v. Limbach, 486 US 269, 273, 108 S Ct 1803, 100 L Ed 2d 302 (1988). States cannot benefit in-state interests by burdening out-of-state interests. New Energy Co. of Indiana v. Limbach, supra, 486 US at 273; see also Wyoming v. Oklahoma, _____ US _____, 112 S Ct 789, 800, 117 L Ed 2d 1 (1992).

The rules at issue here, by the express

language of ORS 459.298, exact a compensatory fee for specific costs incurred by the state. They exact a per-ton surcharge on landfill operators who accept refuse from out-of-state haulers. ORS 459.297 provides that those funds are appropriated to DEQ to meet the costs that it incurs in administering the solid waste program. ORS 459.298 provides that the amount of the surcharge must be based on the costs to the state and its political subdivisions of disposing of solid waste generated out-of-state. Those may include, but are not limited to, costs associated with solid waste management, permit issuance, environmental monitoring, ground water monitoring and site closure. They may not include costs that are paid under other provisions in the chapter. The rules implement those statutory directives.

Laws that impose compensatory fees[18] are

> "not a burden upon, or regulation of, interstate commerce in violation of the commerce clause of the Constitution. A law exhibiting the intent to impose a compensatory fee for such a legitimate purpose is prima facie reasonable." Great Northern Ry. Co. v. State of Washington, 300 US 154, 160, 57 S Ct 397, 81 L Ed 573 (1937). (Footnotes omitted.)

See also Commonwealth Edison Co. v. Montana, 453 US 609, 622 n 12, 101 S Ct 2946, 69 L Ed 2d 884 (1981). When that kind of law is challenged on Commerce Clause grounds, the challenger has the burden to show that the

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[18]A compensatory fee is not the same thing as a "compensatory tax," which is a general revenue measure that is intended to equalize the tax burden between substantially similar interstate and intrastate transactions. The classic example is a use tax imposed on goods purchased out of state that is equivalent to the sales tax that would have been generated had those goods been purchased in state. See Henneford v. Silas Mason Co., 300 US 577, 57 S Ct 524, 81 L Ed 814 (1937). Such taxes permit an individual faced with the choice of an in-state or out-of-state purchase to make that choice without regard to the tax consequences. Boston Stock Exchange v. State Tax Comm'n, 429 US 318, 330, 97 S Ct 599, 50 L Ed 2d 514 (1977). Accordingly, when a state enacts a valid compensatory tax, it does not discriminate against interstate commerce. Complete Auto Transit, Inc. v. Brady, 430 US 274, 97 S Ct 1067, 51 L Ed 2d 326 (1977); see also Maryland v. Louisiana, 451 US 725, 759-60, 101 S Ct 2114, 68 L Ed 2d 576 (1981).

fee is excessive for the purpose for which it is collected, Clark v. Paul Gray, Inc., 306 US 583, 599, 59 S Ct 744, 83 L Ed 1001 (1939), or that "there is no sufficient relation between the measure employed and the extent or manner of use" of the state provided service. Interstate Transit, Inc. v. Lindsey, 283 US 183, 190, 51 S Ct 380, 75 L Ed 953 (1931).[19]

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[19]Petitioners argue that we should apply the reasoning in a number of cases that address discriminatory health and general welfare laws and general revenue measures. Regulations that control conduct to protect some aspect of the health or general welfare of a state's citizens are valid when preservation of health or welfare is the law's true purpose and the means chosen to achieve that objective does not unduly burden interstate commerce. Maine v. Taylor, 477 US 131, 106 S Ct 2440, 91 L Ed 2d 110 (1986); Pike v. Bruce Church, Inc., 397 US 137, 142, 90 S Ct 844, 25 L Ed 2d 174 (1970). However, if the actual purpose or effect of a health or welfare regulation is economic or resource protectionism, the law may be invalid. See, e.g., Wyoming v. Oklahoma, supra; Hunt v. Washington State Apple Advertising Comm., 342 US 333, 97 S Ct 2434, 53 L Ed 2d 383 (1977); Dean Milk Co. v. City of Madison, 340 US 349, 71 S Ct 295, 95 L Ed 329 (1951); compare Maine v. Taylor, supra, with City of Philadelphia v. New Jersey, supra. General revenue measures are taxes imposed to compensate the state for "providing police and fire protection, the benefit of a trained work force, and the advantages of a civilized society." Commonwealth Edison Co. V. Montana, supra, 453 US at 624. (Citations and internal quotations omitted.) A state can impose such a tax on those engaged in interstate commerce if it

In Interstate Busses Corp. v. Blodgett, 276 US 245, 48 S Ct 230, 72 L Ed 551 (1928), a state law had assessed a per-mile user fee on busses engaged in interstate commerce but did not assess that fee on those engaged in intrastate commerce. The Court first recognized that a state may impose a reasonable charge for the use of the facilities that it provides to those engaged in interstate commerce, roads, in that case. It then determined, from a facial review of the statutory scheme, that the funds generated were dedicated to financing those

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"is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State." Complete Auto Transit, Inc. v. Brady, supra, 430 US at 274.

When a law satisfies that standard, out-of-state interests pay their fair share of the costs of running the state.

The statutes and rules here neither regulate conduct nor impose taxes that support state government generally. The fees are based on and applied to the provision of a narrow range of state services that are directly connected to the activity on which the fees are imposed.

facilities. The Court sustained the validity of the fee, because the party challenging it failed to show that "the aggregate charge [bore] no reasonable relation to the privilege granted." 276 US at 252.

In Clark v. Paul Gray, Inc., supra, the state had exacted a "caravaning" fee for each automobile "operated on its own wheels, or in tow of a motor vehicle, for the purpose of selling or offering the same for sale* * *within or without [the] State." 306 US at 586. (Citation omitted.) The purpose of the fee was

> "to reimburse the State for expenses [sic] incurred in administering police regulations pertaining to the operation of vehicles moved pursuant to such permits and to public safety upon the highways as affected by such operation." 306 US at 586. (Citation omitted.)

Because the law exempted cars moved exclusively within one of two zones that were roughly defined as the northern and southern halves of the state, the plaintiffs

claimed that it unlawfully discriminated against interstate commerce. The Court disagreed. It first determined that the distinction that the state had made between intrazone and interzone traffic was permissible, because the state incurred a distinct burden by managing and facilitating the latter form of traffic and the intrazone traffic was already paying its fair share of costs of that commerce. The Court then recognized that the fees would offend the Commerce Clause if the plaintiffs showed that they were "excessive for the declared purposes." 306 US at 599. Because the fees did not appear, on their face, to be manifestly disproportionate to the services rendered, and the plaintiffs failed to present any other evidence of disproportionality, the Court sustained the validity of the fees.

EQC's rules exact a compensatory fee for the distinct burden that the state

incurs to regulate and facilitate disposal of out-of-state waste. Unlike the Michigan plan at issue in Chemical Waste Management, Inc. v. Hunt, supra, the rules impose a surcharge on in-state and out-of-state waste for the state services. The state might nevertheless be unlawfully discriminating if there is no reason, apart from its origin, to charge more for its services to manage and regulate out-of-state waste than it charges to manage and regulate in-state waste. The state, however, appears to have a reason apart from origin per se to treat out-of-state waste differently. It first encounters any out-of-state waste at the disposal site. In contrast, by the time in-state waste reaches the disposal site, it has already been subjected to state and local regulations and fees that are designed to reduce its volume and alter its character in order to limit the risks associated with dumping it on the ground. See n. 14, supra.

We cannot discern, from a facial review of the rules and legislation whether, in the aggregate, in-state garbage ultimately "pays" all of the costs that the state and its political subdivisions incur to manage and regulate its disposal. However, it does show that EQC is expressly forbidden to impose fees on out-of-state waste that exceed the costs of management of that waste. The legislature had made abundantly clear that it intends only to make "out-of-state generators pay their 'fair share' of the costs" and no more. Chemical Waste Management, Inc. v. Hunt, supra, _____ US at _____ n 9. Therefore, before we could say that the rules are unconstitutional, petitioners would have to show that the fees are excessive for the purposes for which they are collected or that there is no sufficient relation between the measure employed and the extent or manner of use of the state provided service.

Petitioners brought this challenge under ORS 183.400, which provides, in part:

> "(3) Judicial review of a rule shall be limited to an examination of:
>
> "(a) The rule under review;
>
> "(b) The statutory provisions authorizing the rule; and
>
> "(c) Copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures."

A facial review of the enabling legislation and the rules does not show that the fees are either excessive or unrelated to the state provided service. ORS 183.400(3) does not permit us to consider the evidence that petitioners would have to produce to show that the fees are, nevertheless, manifestly disproportionate to the costs incurred by the state to manage and facilitate disposal of out-of-state waste. That kind of evidence can be considered only on review of an order in a contested case. ORS 183.482.

Rules held valid.

APPENDIX C

Statutes

ORS 183.400 Judicial determination of validity of rule.

* * *

(3) Judicial review of a rule shall be limited to an examination of:

(a) The rule under review;

(b) The statutory provisions authorizing the rule; and

(c) Copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures.

(4) The court shall declare the rule invalid only if it finds that the rule:

(a) Violates constitutional provisions;

(b) Exceeds the statutory authority of the agency; or

(c) Was adopted without compliance with applicable rulemaking procedures.

ORS 459.015 Policy. (1) The

Legislative Assembly finds and declares that:

(a) The planning, development and operation of recycling programs is a matter of statewide concern.

(b) The opportunity to recycle should be provided to every person in Oregon.

(c) There is a shortage of appropriate sites for landfills in Oregon.

(d) It is in the best interests of the people of Oregon to extend the useful life of solid waste disposal sites by encouraging recycling and reuse of materials, and by requiring solid waste to undergo volume reduction through recycling and reuse measures before disposal in landfills to the maximum extent feasible. Implementation of recycling and reuse measures will not only increase the useful life of solid waste disposal sites, but also decrease the potential public health and safety impacts associated with landfill operation.

(2) In the interest of the public health, safety and welfare and in order to conserve energy and natural resources, it is the policy of the State of Oregon to establish a comprehensive statewide program for solid waste management which will:

(a) After consideration of technical and economic feasibility, establish priority in methods of managing solid waste in Oregon as follows:

(A) First, to reduce the amount of solid waste generated;

(B) Second, to reuse material for the purpose for which it was originally intended;

(C) Third, to recycle material that cannot be reused;

(D) Fourth, to compost material that cannot be reused or recycled;

(E) Fifth, to recover energy from solid waste that cannot be reused, recycled or composted so long as the energy recovery

facility preserves the quality of air, water and land resources; and

(F) Sixth, to dispose of solid waste that cannot be reused, recycled, composted or from which energy cannot be recovered by landfilling or other method approved by the department.

(b) Clearly express the Legislative Assembly's previous delegation of authority to cities and counties for collection service franchising and regulation and the extension of that authority under the provisions of ORS 459.005, 459.015, 459.035, 459.250, 459.992, 459.995 and 459A.005 to 459A.665.

ORS 459.297(1) Surcharge on solid waste generated out-of-state.

(1) Beginning on January 1, 1991, every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site shall pay a surcharge as established by the Environmental Quality

Commission under ORS 459.298. The surcharge shall be in addition to any other fee charged for disposal of solid waste at the site.

ORS 459.298 Amount of surcharge on solid waste generated out-of-state.

"Subject to approval by the Joint Committee on Ways and Means during the legislative sessions or the Emergency Board during the interim between sessions, the Environmental Quality Commission shall establish by rule the amount of the surcharge to be collected under ORS 459.297. The amount of the surcharge shall be based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for under the provisions of ORS 459.125 and 459.297, 459.298, 459.411 to 459.417, 459A.100 to 459A.120 and sections 70 to 73, Chapter 833, Oregon Laws 1989. These costs may include but need not be

limited to costs incurred for:

(1) Solid waste management;

(2) Issuing new and renewal permits for solid waste disposal sites;

(3) Environmental monitoring;

(4) Ground water monitoring; and

(5) Site closure and post-closure activities.

OAR 340-61-115(1) (renumbered OAR 340-97-110(1)).

Beginning July 1, 1984, each person required to have a Solid Waste Disposal Permit shall be subject to a three-part fee consisting of a filing fee, an application processing fee and an annual compliance determination fee as listed in OAR 340-61-120. In addition, each disposal site receiving domestic solid waste shall be subject to an annual recycling program implementation fee as listed in OAR 340-61-120, and a per-ton fee on domestic solid waste * * *. In addition, each disposal

site or regional disposal site receiving waste generated out-of-state shall pay a surcharge as specified in section (6) of this rule.

OAR 340-61-120(6) (renumbered OAR 340-97-120(6)).

Surcharge on disposal of waste generated out-of-state. Each solid waste disposal site or regional solid waste disposal site that receives solid waste generated out-of-state shall submit to the Department of Environmental Quality a per-ton surcharge of $2.25. This surcharge shall apply to each ton of out-of-state waste received at the disposal site.

APPENDIX D

EXCERPTS FROM STATE'S BRIEF TO OREGON COURT OF APPEALS, JULY 12, 1991

At page 7:

The issue in this case is whether Oregon's reasons for the apparent discrimination in the statute and rule pass constitutional muster. Petitioners themselves rely on the record to support their claim that out-of-state garbage is indistinguishable from in-state garbage, e.g. Pet Br 11-12, thus acknowledging, albeit indirectly, that Oregon's reasons for the apparent discrimination are significant. In a portion of City of Philadelphia v. New Jersey, 437 US 617, 98 S Ct 2531, 57 L Ed 2d 475 (1978) which petitioners quote, the Court stated that a state's goals "may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." This case is about Oregon's

reasons for the apparent difference in treatment Oregon accords out-of-state garbage. Petitioners have cited no case in which the Supreme Court has declined to examine the reasons offered by a state in support of the challenged regulation and DEQ is aware of no such case.

At pages 12-15 (footnote omitted):

Interstate commerce may be required to pay the costs it imposes upon a state. A fee designed to reimburse the state for costs actually incurred does not violate the Commerce Clause so long as it "is based on some fair approximation of use or privilege for use, * * * and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit." Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 US 707, 716-17, 92 S Ct 1349, 31 L Ed 2d 620 (1972). Petitioners' claim is that the challenged rule discriminates against interstate

commerce.

DEQ's response to their claim is, in its essence, quite simple. All garbage dumped in Oregon -- in-state and out -- imposes costs on the State of Oregon. Those costs are borne by Oregon taxpayers. Oregon is entitled to charge reasonable fees gauged to relieve its taxpayers of the burdens imposed by petitioners' choice to dump garbage in Oregon. To challenge Oregon's imposition of those costs on the ground that the fee impermissibly burdens interstate commerce petitioners would have to prove the fees charged were manifestly disproportionate to the costs imposed. That they have not done. Thus, they may not prevail unless they are able to establish that the fees discriminate against interstate commerce.

Petitioners' complaint of discrimination arises because the costs garbage generated in Oregon imposes on the

state are paid by a combination of per ton fees and general fund revenues, while the cost of out-of-state garbage is paid by per ton fees alone. Petitioners label that difference in treatment a discrimination against interstate commerce. For a state regulation to be a discrimination against interstate commerce within the meaning of the United States Supreme Court's Commerce Clause jurisprudence, however, it must be a protectionist measure: a law that either provides competitive advantage to local industry at the expense of interstate industry -- economic protectionism -- or a law that seeks to preserve resources for the state's citizens by giving them free access to those resources while denying access to out-of-state users -- resource protectionism. This fee provides in-state business with no competitive advantage over out-of-state business. Oregon landfills do not benefit in competition with out-of-state

landfills. The only possible "beneficiaries" of apportioning a part of the burden among the taxpayers rather than placing it all on garbage generators would be a hypothetical group of Oregonians whose garbage production was disproportionately high in comparison to their tax burden; conversely, the only losers would be Oregonians whose waste production was proportionately lower in comparison to their taxes. The record contains no evidence that either group exists. More important, the Supreme Court has never held that a state statute violates the Commerce Clause when all the "gainers" and "losers" are citizens of the state whose tax or fee is under attack. Nor is the challenged fee "resource protectionist," intended to preserve a scarce resource, in this case landfill space, for Oregonians. Out-of-state garbage generators have access to Oregon landfills. They are simply required, like Oregonians,

to bear their share of the cost of resource preservation.

Full explication of DEQ's argument is in two parts. First, Oregon, like any other state, is entitled to recover costs imposed upon it by interstate commerce. Second, the fee on out-of-state garbage is not discriminatory within the meaning of Commerce Clause jurisprudence because it is not a protectionist measure. It is constitutionally irrelevant that Oregon defrays a part of the costs of in-state garbage by general fund revenues collected form all Oregon taxpayers rather than by per ton charges collected from all Oregon waste producers because doing so is not protectionism. The real question in this case is why petitioners believe that Oregon taxpayers, who bear the costs of regulating dumping their own garbage, must also bear the cost of regulating dumping out-of-state garbage.